TABLE OF CONTENTS

Assignment of Errors 1-2

I. That the Court Erred in Holding That the Action of the Land Officers of the United States in Issuing Patents to "Creek" Lands, Believing Them to Be "Sac and Fox" Lands Subject to the Act of February 13, 1891, Evidenced an Intention to Take the Fee Title of the Creek Nation to Creek Lands, under That Act 2

Act of February 13, 1891 (26 Stat. 749, 750) 2

United States vs. Carpenter, 111 U. S. 347 .. 4

II. That the Court Erred in Disregarding the Effect of the Acts of April 26, 1906, and June 21, 1906, upon the Issues Involved in This Case .. 4

Act of April 26, 1906 (34 Stat. 137) 4

Act of June 21, 1906 (34 Stat. 325, 364) 4

Act of 1885 (23 Stat. 362, 367) 6

Act of 1889 (25 Stat. 757, 758) 6

Act of 1891 (26 Stat. 749) 6

III. That Although Holding That the United States Was Duty Bound to Recover Said Creek Lands for the Creek Nation, and That It Could Have Done So at Any Time Up to the Filing of This Suit, Yet, the Court Erred in Holding That the United States Should Not Account to the Creek Nation for the Value of These Lands at the Date of the Filing of This Suit 9

20 C. J. 831 and cases there cited 12

Jacobs vs. United States, 290 U. S. 13, 18 .. 11

Otter vs. Manhattan Ry. Co., 37 N. Y. S. 982 12

Pittsburgh, etc., R. Co. vs. Perkins, 31 N. E. 350 12

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 2.

THE UNITED STATES, PETITIONER,

VS.

THE CREEK NATION, RESPONDENT.

PETITION FOR REHEARING OF THE CREEK NATION.

Comes now the Creek Nation, by counsel, and petitions this Honorable Court for a rehearing of the above-entitled cause, for errors of law contained in its opinion of April 29, 1935, which errors of law are now assigned as follows:

1. That the court erred in holding that the action of the land officers of the United States in issuing patents to "Creek" lands, believing them to be "Sac and Fox" lands subject to the act of February 13, 1891, evidenced an intention to take the fee title of the Creek Nation to Creek lands, under that act.

2. That the court erred in disregarding the effect of the acts of April 26, 1906, and June 21, 1906, upon the issues involved in this case.

3. That although holding that the United States was duty bound to recover said Creek lands for the Creek Nation, and that it could have done so at any time up to the filing of this suit, yet, the court erred in holding that the United States should not account to the Creek Nation for the value of these lands at the date of the filing of this suit.

These, in the order of their statement:

I.

In its opinion the court decided the question of the time as of which the value of the lands involved in this suit should be determined upon the action of the land officers of the United States in issuing patents to Creek lands and the alleged confirmation of their action by the United States. The action of the officers represented an erroneous application by those officers of the act of February 13, 1891 (26 Stat. 749, 750).

It is earnestly and respectfully urged that the erroneous application of the act of 1891 to Creek lands and the erroneous issuance of patents thereunder, the officers of the United States believing at the time that they were dealing with Sac and Fox lands, are not a basis for holding that these acts of the administrative officers divested the Creek Nation of any title whatsoever to the lands in question.

By Article I of the Agreement of June 12, 1890, between the United States and the Sac and Fox Nation, as set forth in the act of Congress approved February 13, 1891 (26 Stat. 749, 750), the Sac and Fox Nation ceded to the United States "all their title, claim or interest" to the lands thereinafter described by metes and bounds "beginning at a point on the left bank of the north fork of the Canadian River, where the west boundary line of the Creek Reservation crosses the same; thence north with said west boundary line to the right bank of the Cimarron River," etc., etc.

The court of claims in its findings of fact (Rec. p. 9) found as a matter of fact that the line thus described above was the Bardwell line. The court said:

> "the west boundary line of the Creek Nation constituting the line established by the Bardwell survey."

This description shows clearly that the Sac and Fox cession ratified by the act of February 13, 1891, followed the Bardwell line and did not include any of the lands involved in this litigation.

It is evident that Congress intended that this act of February 13, 1891, should apply only to Sac and Fox lands and not to any lands east of the Bardwell line. That act specifically limits its operation to lands west of the Bardwell line. (Finding of Fact XI of the Court of Claims, Rec. p. 9.)

It is also apparent from the record that the land officers of the United States thought they were dealing with Sac and Fox lands although they issued patents to Creek

lands, for it was not until the last survey was made in 1905 (Finding XIV, Rec. p. 10) that these errors were definitely disclosed to such officers.

The land officers could pass no title to Creek lands under these erroneous patents, for they had no power to convey Creek title to Creek lands under the act of 1891. Therefore, the patents were void *ab initio*. Consequently, they could pass no title to the settlers to whom they were issued. It should be remembered that by the 1891 act Congress expressly limited its operation to Sac and Fox lands west of the Bardwell line. Consequently, the officers of the United States, when issuing patents to Creek lands east of the Bardwell line, believed they were dealing with Sac and Fox lands. That the stipulation of an Indian treaty granting land to an Indian tribe "could not be defeated by the action of any officers of the land department" is well settled. *United States* v. *Carpenter*, 111 U. S. 347.

II.

It is respectfully submitted that the court erred in not giving effect to the acts of April 26, 1906 (34 Stat. 137), and June 21, 1906 (34 Stat. 325, 364).

The act of April 26, 1906, provides in part as follows:

> "Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes * * * for the * * * recovery of any land claimed by any of said tribes * * *, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits * * *."

The act of June 21, 1906, contains this provision:

> "That the boundary line between the Creek Nation, Indian Territory, and the Territory of Oklahoma, as surveyed by Frederic W. Bardwell in eighteen hundred and seventy-one, and reestablished by the Geological Survey in eighteen ninety-six, is hereby declared to be the west boundary line of the Creek Nation."

What effect do these acts have upon the present controversy? We respectfully submit that they are material. As a matter of fact, when Congress was informed of the errors made by the officers of the United States, the facts being reported to it by them, the act of June 21, 1906, was passed declaring the Bardwell line to be the west line of the Creek Nation. (Rec. p. 10.) If there were doubts before regarding the true boundary line of the Creek Nation, none could exist after the passage of that act; and any existing cloud on the Creek title to lands east of the Bardwell line arising out of the erroneous issuance of patents was then removed.

In its opinion in this case, the court says:

> "Plainly the appropriation was not in 1873, when Darling's survey was approved by the Commissioner of the General Land Office. That survey did not effect any change in the existing ownership; nor was it intended to do so. The most that can be said of it is that it was done erroneously and, in the absence of correction, might lead to further error.
>
> "But not so of the disposals under the act of 1891. They were intended from their inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, they rested on an erroneous application of the act of 1891 to the

> Creek lands in the strip; *but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals.* It was through them that the lands were taken; so the compensation should be based on the value at that time, and not, as ruled below, on the value when the suit was begun." (Italics ours.)

Elsewhere in the opinion the court points out just how the confirmation of the disposals by the United States was effected. We quote from the opinion:

> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the disposals to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way the United States in effect confirmed the disposals; and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them."

The Bardwell line was first established in 1871. It was reaffirmed in the acts of 1885 (23 Stat. 362, 367), 1889 (25 Stat. 757, 758) and 1891 (26 Stat. 749). In 1895-1896 it was again established by the Geological Survey. We have seen that by the act of June 21, 1906, it was provided that the Bardwell line was the true western boundary line of the Creek Nation.

It is entirely clear that although settlers were in *possession* of the 5,575.57 acres of land here involved they had no lawful *title* thereto; and that *as late as June 21, 1906, Congress, when dealing with the title to such land, not only failed to confirm the 1891 disposals but in effect repudiated them.* The language of the 1906 act is wholly inconsistent with the finding that the United States confirmed the 1891 disposals prior to the passage of the jurisdictional act of 1924. We respectfully suggest that force and effect should be given to the act of June 21, 1906. It deals specifically with the question of the title to the land involved in this litigation. By its express terms it reestablished the Bardwell line. If it had been intended to confirm the 1891 disposals, would Congress have reestablished the Bardwell line as the western boundary line of the Creek Nation, the location of which was wholly inconsistent with such disposals?

We must conclude, therefore, that the United States did not, prior to June 21, 1906, confirm the 1891 disposals, and it is not claimed that any act of confirmation intervened between that date and May 24, 1924, the date of the passage of the jurisdictional act.

The court of claims said:

> * * * It is significant that no official of the Indian Office, of the General Land Office, or of the Department of the Interior having to do with these matters, ever questioned the right or title of the Creek Nation in, or to, these lands, or ever asserted that the United States had title to them at the time they were opened to settlement in 1891. On the contrary, they, without exception, advised Congress that title to the land was in the Creek Nation and that set-

tlers on the land to whom patents had been issued acquired no title to the land thereunder. The Commissioner of Indian Affairs in a report to the Secretary of the Interior, August 7, 1903, said:

"'The Government of the United States is not a guarantor of the area within any description of land patented by it under the laws of the United States * * *. At the time the patents were issued, the land was a part of the property of the Creek Nation. The Government of the United States had no title to it, and, therefore, its patent did not operate to convey the land.'

"The Secretary of the Interior in a report to Congress on April 9, 1906, said:

"'The homestead claimants have no legal title to the land in the Creek Nation east of the Bardwell line patented to them, and * * *.'

"The Secretary of the Interior in this report recommended to Congress that the 5,575.57 acres be appraised at their cash value and that payment therefor be made to the Creek Nation."

The report of the Secretary of the Interior was made to Congress in 1906 and was the basis upon which it reaffirmed the Bardwell line as the west boundary of the Creek Nation. In the consideration of the act, Congress refused to provide that the Creek Nation should be paid an amount equal to the value of the lands in 1906. From the history of the case, it is entirely clear that Congress, in so refusing to provide for payment of the 1906 value, had in mind the restoration of the lands in kind. It is worth while to recall at this point that Congress had only a few months previously passed the act of April 26, 1906, empowering the Secretary of the Interior to recover the lands for the Creek Nation.

For the failure of the United States to restore these Creek lands under the acts of 1906, a new cause of action arose. The *special* jurisdictional act of 1924 provides that the court of claims may adjudicate "all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or tribe, *or arising under or growing out of any act of Congress in relation to Indian affairs.*" (Italics ours.) The duty of the officers of the United States to institute suit for the recovery of the lands in question was mandatory, and a violation of that duty gave rise to a claim by the Indians against the United States. That claim arose out of the acts of 1906.

III.

This court recognized that it was the duty of the United States to restore to the Creek Nation its lands, and that the United States "would have been entitled to a cancellation of the disposals had it instituted suits for that purpose." It is held, however, that the Creek Nation cannot recover the value of the land as of the date of the filing of this suit.

We respectfully suggest that the effect of the court's decision is to give some efficacy to patents which were void *ab initio*. Is not the more acceptable view that the United States, having acquired full knowledge of the facts and being under duty to secure the cancellation of these erroneous patents and to restore the possession of these lands to the Creek Nation, and having made no effort to do so, should not be permitted to avoid payment of the maximum value the Creek Nation could have re-

ceived had the United States done its duty? The duty of the United States to secure a cancellation of the patents was a continuous one after the issuance of the patents. That duty was reaffirmed by the acts of 1906. The failure of the United States to do its duty in this regard would seem to militate against it, and any loss resulting from such failure should be charged against it. It should be kept in mind that the act of 1924 confers jurisdiction on the court of claims to render judgment upon "all legal and equitable claims" arising under treaties and statutes, and that we are concerned here with the breach of duty of a guardian to a ward.

That the United States elected to leave the settlers undisturbed should not affect in any manner the amount of the settlement between the United States, the guardian, and the Creek Nation, its ward. The land was sold to homesteaders by the United States in the years 1896-1905. The court below awarded $30.00 per acre as the value at the date of the institution of this action. The United States could have recovered this land for the Creek Nation *at a time when it was worth $30.00 per acre*, and thus have discharged properly its duty to its ward. Should the ward be permitted to suffer when the guardian is called upon to account for its dereliction of duty?

Instead of recovering the lands, the United States elected to defend this suit. It thus elected to take the consequences of its own breach of duty. Surely the failure of the guardian to do its plain duty for its ward should not deprive the latter of the benefits that would have resulted to it from a correct solution of the problem,

viz., the restoration to it of the lands under the acts of 1906.

We respectfully submit that such an election on the part of the United States to permit the settlers to remain on these Creek lands would not deprive the Creek Nation of the right to the value of these lands as of the date of the filing of this suit, when the duty of the United States to restore the lands continued up until the passage of the act of 1924.

In taking the position in this case that the value of the lands should be determined as of the date of the filing of the petition, we are not unmindful of a line of authorities in eminent domain cases which hold interest from the time of the taking of property is suitable compensation for the delay in making payment of just compensation under the constitution. The latest of these cases that has come to our attention is *Jacobs* v. *United States*, 290 U. S. 13, 18. The facts of the present case, however, are peculiar and, we suggest, call for the application of a different rule. In saying this, we are thinking of the repudiation by Congress of the acts of the land officers of the United States in issuing patents to the lands in question, which is to be taken from the acts of 1906.

Moreover, this is a proceeding under a special jurisdictional act authorizing suits for violations of treaty and other statutory duties, owing by the guardian to the ward, which requires a settlement of both "legal and equitable claims," thus invoking consideration of *equitable* as well as legal principles.

Even in eminent domain cases, when the "taking" is wrongful, as it was in this case, it is well settled that

the court may award the value as of the date of the institution of suit, especially when the intrusion is a continuing trespass. See 20 C. J. 831 and cases cited; *Otter* v. *Manhattan Ry. Co.*, 37 N. Y. S. 982; *Pittsburgh, etc., R. Co.* v. *Perkins*, 31 N. E. 350. This principle was applied in settlements between private parties, and it should have even greater force here involving the guardian's violations of its treaty and statutory duties.

For these reasons, we earnestly and respectfully request that the Creek Nation be granted a rehearing on the matters specifically set forth herein.

Respectfully submitted,

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